

# Exit law, enter politics: The foundations and the legacy of the contested independence of Kosovo

## *Los fundamentos y el legado de la contestada independencia de Kosovo: entre derecho y política internacionales*

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### Abstract

The way Kosovo is achieving independence has been welcomed with antithetical opinions in the international community, especially with respect to international law. This paper attempts to shed light on the legal trajectory which brought Kosovo on the way to statehood. After determining that Kosovo has not, *prima facie*, any positive right to independence, its *de facto* statehood is contrasted with a few doctrines that could contribute to support it, namely self-determination, remedial secession theory, and international dispositive powers. The analysis finds that Kosovo independence might be legally justifiable under a collective recognition theory, possibly supported with remedial arguments. Having further enquired over the effectiveness and the legitimacy of its independent status (statehood criteria), this article contends that such turn of developments in Kosovo is better explained through more genuine political reasoning. The validity of independence as a solution is not debated in itself, but on the basis of the whole process the negative effects of reaching such outcome by the way of a one-sided decision are discussed.

**Keywords:** Kosovo, Secession, Independence, International Law, International Relations, Statehood Criteria.

### Resumen

La manera en que Kosovo está a punto de obtener la independencia fue acogida con opiniones antitéticas en la comunidad internacional, en particular con respecto al derecho internacional. Este artículo tiene como reto aclarar la trayectoria jurídica que ha llevado Kosovo camino a la estatalidad. Tras determinar que Kosovo no goza, *prima facie*, de un derecho positivo a la independencia, su estatalidad *de facto* se pone en contraste con unas cuantas doctrinas que podrían contribuir a soportarla, eso es, la autodeterminación de los pueblos, la teoría de la secesión como remedio, y los llamados “poderes dispositivos internacionales” (international dispositive powers). El análisis

halla que la independencia de Kosovo podría justificarse bajo una teoría del reconocimiento colectivo, posiblemente reforzada con argumentos de remedio. El artículo sigue investigando sobre la efectividad y la legitimidad de su estatus independiente (criterios de estatalidad), y finalmente se sostiene la idea de que este giro de acontecimientos en Kosovo mejor se explica con un razonamiento más genuinamente político. La validez de la independencia como solución en sí misma no es discutida; en cambio, basándose en el intero proceso, se debaten los efectos negativos de haber llegado a tal resultado por medio de una decisión unilateral.

**Palabras clave:** Kosovo, Secesión, Independencia, Derecho Internacional, Relaciones Internacionales, Criterios de Estatalidad.

## Introduction

The 17 of February 2008 the Provisional Institutions of Self-Government unilaterally declared the formal independence of Kosovo from Serbia<sup>1</sup>. A number of countries immediately recognized Kosovo as a new sovereign state; but after the initial momentum, due to the negative stance of its parent state, recognitions have proceeded rather slowly.<sup>2</sup> The echo of these developments in the international community, anyway, does not seem to decrease, affecting equally states and international lawyers.<sup>3</sup> With good approximation, the mixed reactions of lawyers can be said to reflect the practice of states, which ranges from unconditional support to resolute opposition, including an option of silence or neutrality. It is evident that one of the main concerns, among both supporters and detractors of the independence, is trying to place this fact in relation with existing norms of international law. The task is admittedly difficult, since in hard cases like this law and politics seem to be inextricably interwoven.<sup>4</sup> The objective difficulty of legally framing the case of Kosovo, is coupled with the widespread feeling that many basic tenets of international law have been given a shake.<sup>5</sup> An overview of international legal articles on the subject reveals that a few, crucial issues are of common concern: the legality of unilateral independence, the legitimacy of external recognition, the friction between the principles of self-determination and territorial integrity, the fulfilment of the criteria for statehood, and the precedential effects of a purported *sui generis* solution. With a close eye on the legal dimension in which the Kosovo case has developed in recent years, this paper is focused on the process which created the conditions for -and which is apparently leading to- the independence of Kosovo. The purpose is trying to determine on what side of the legal-political balance the justifications for a unilateral independence weigh.

The article consists of three main sections. Section I presents an overview of the salient moments in the recent political and legal history of Kosovo and is made up of four sub-sections. The first one shortly examines the period which goes from 1989 to 1999, in which the situation in Kosovo gravely deteriorated; the second indulges on the NATO humanitarian intervention of 1999, recalling the controversy which arose in the international community; the third analyses the difficulties and the ambiguities of the international administration period; and the last one provides some details about the Unilateral Declaration of Independence (UDI) and the international reactions that followed. Section II deals with the intricate normative dimensions of secession under general international law and the special regime created under the Security Coun-

1. The Albanian spelling is 'Kosova'; throughout this article the English/international spelling is in use.

2. With the recognition of Somalia (19 May 2010) the number of states which recognized Kosovo now amounts to 69. The recognitions one year after the UDI (17 February 2009) were summing up 54.

3. Benedek (2008), at 391.

4. Borgen (2008); Jia (2009), at 29.

5. Hilpold (2009), at 47-48.

cil Resolution 1244 (S/Res/1244). Having found that apparently the UDI is not in line with the international legal framework provided by the United Nations mission (UNMIK), three additional discrete legal grounds for asserting the lawfulness of the unilateral independence are discussed, namely: self-determination, remedial secession theory, and international dispositive powers. Having determined that Kosovo authorities have reached partial independence following to collective recognition of part of the international community, section III scrutinizes to what extent the secession of Kosovo can be deemed successful in its aim of establishing a fully independent state. First, its degree of *effectivité* as a sovereign nation is put into relation with both traditional and so called additional criteria for statehood; such factual analysis either does not present unequivocal elements in favour of independent statehood. Secondly, it is recalled the role and the justifications of international supporters of Kosovo statehood in order to frame its secession as a *fait accompli*. The last subsection supports the argument that the independence of Kosovo has been defended by international actors on the basis of political rather than legal reasoning, and deals with a few detrimental effects of pushing for such one-sided solution.

## I. The origins of the internationalized dispute

### A. The crisis of the 1990's

Inter-ethnic clashes between Serbs and Albanians in Kosovo have deep historical roots but aggravated in the 20th century, once Serbians consolidated their sovereignty over the region. With the Titoist constitution of 1974, Albanians finally attained a status similar to that of other Yugoslav nations and Kosovo gained prerogatives in all similar to the other constituent republics, left aside a full federal status. The crisis of the 1990s is generally imputed to the political project of Slobodan Milošević, who managed to capitalize on Serbian nationalism in one of the most difficult transitional periods Yugoslavia had to confront. On the one hand, he had to face the growing resentment of the Albanian population of Kosovo (accounting for almost 90% of the total), which were demanding federal status (or outward independence) for their province; on the other hand, he had to listen to the equally increasing calls for reaction of the local Serbian community, whose presence had been historically threatened by acts of intimidation on behalf of the Albanians. On these premises, the central government decided in 1989 to unilaterally revoke the autonomous status of Kosovo. This act was followed by a policy of exclusion and oppression of Albanians in all aspects of social and political life. Special police measures were adopted, which exposed the Albanian community to systematic violations of their fundamental rights, and which arguably precipitated the disintegration of Yugoslavia.

Under the leadership of Rugova, Albanians started to build parallel institutions, and committed to avoid direct confrontation with the Serbian forces. Following the example of Slovenia and Croatia, which in 1992 successfully seceded from the SFRY, Kosovo itself declared independence from Serbia. However, despite its crystalline conflict potential, the peaceful Albanian resistance received little or no attention at the international level;<sup>6</sup> it could also be contended that the Albanian resistance did not raise such attention exactly because it was perceived to be firmly advocating for outward secession. As a matter of fact, the European Community -by voice of the Badinter Arbitration Committee- in the context of the dissolution of Yugoslavia decided that only the consti-

6. Mertus (2009), at 475.

tuent Republics had a right to seek international recognition, and that ethnic minorities had no right to external self-determination. Kosovo's request for recognition, and the situation of Kosovo as a whole, was therefore not even deemed worth of consideration. The Dayton conference, which brokered the peace in Bosnia in 1995, confirmed the disregarding international attitude towards Kosovo. It was at the same time sending two dangerous messages to the Albanian community: first, that westerners would be more prone to pay attention to a violent party than to a non violent one; and secondly, as the creation of the Republika Srpska of Bosnia possibly testified, that the West could recognize territorial changes operated by force and ethnic cleansing.

A major shift in the Albanian strategy thereafter occurred. While the personal leadership of Rugova started to waver, a growing section of the population felt ready to embrace weapons and fight for the Albanian cause. The appearance in 1996-1997 of the Kosovo Liberation Army (KLA), which adopted the strategy of armed conflict (including terrorist and guerilla tactics) to challenge the Serbs, undeniably made the Serbian-Albanian conflict escalate, sinking all chances of peaceful resolution of the conflict. Having to confront now a secessionist armed group, Serbia launched high-scale military operations, in order to sedate the rebel province. At this point the international community began to press for diplomatic solutions, seeking to mediate between the parties. But after finding allegations of mass murder of Albanians the US and European countries abandoned their uncertainties in favour of a more robust power stance *vis-à-vis* Milošević. The KLA, previously considered a terrorist group, became the principal interlocutor of Western diplomacy. Forcing the parties to convene at Rambouillet, the Western powers sought to impose on them conditions, which were particularly severe, especially if contrasted with the principle of national sovereignty.<sup>7</sup> The predictable refusal of the Serbian leadership to sign the Rambouillet Accords rapidly convinced the Western leaders of the opportunity of a military intervention to be conveyed by NATO after opportunely reformulating its strategic doctrine.

## B. Operation Allied Force

The Operation Allied Force (OAF) is discussed somehow in detail since it did much to create the “unprecedented” case of Kosovo. Unable to obtain an authorization to proceed against Belgrade in the Security Council (SC) -due to a predictable Russian veto- NATO decided to initiate the military operations autonomously, under the moral justification of averting a humanitarian disaster. The opposition to deploy ground troops, especially in the United States, forced NATO to an aerial bombing campaign of the Federal Republic of Yugoslavia (FRY), with the wrong reposed idea of inducing Milošević to a rapid withdrawal. Furthermore, for fear of allied losses, the air strikes were conducted from a height of 5,000 feet, which on the one hand made difficult countering Serbian movements on the battlefield, and on the other hand proportionally increased the chances of missing or mistaking targets.

In virtue of their unopposed control of the ground, and with the amplified internal support that an illegal attack to the homeland could predictably trigger, Serbian military and paramilitary groups intensified the operations against both the KLA and Albanian civilians. In order to subdue the bold Serbian attitude, NATO had to reach the third (and last) operational phase of the campaign, which significantly widened the range of possible objectives, including dual use (civil-military) facilities such as bridges, factories,

7. The so called “Rambouillet Accords” were meant to provide Kosovo with meaningful self-government, the withdrawal of Serbian forces and the deployment of a NATO contingent, in view of a final referendum on the status of Kosovo to be held within three years. These conditions were non-negotiable. Appendix B of the document, contained provisions which were considered –even by foreign commentators- unacceptable. Cf. *Interim Agreement for Peace and Self-Government in Kosovo*, Appendix B, para. 6 – 11.

electric infrastructure and telecommunications. Overall, it took 78 days and thousands of raids -it is to add, on the whole territory of the Federal Republic- to overcome the regime of Milošević. The shock in Serbian society was great, and alimanted a sense of anger towards the West which is still evident today. From a Serbian point of view, there was no case in the history where a sovereign state had been bombed and forced to withdraw from its own territory when it sought to get rid of a secessionist armed group. The operation -and the contemporary enlargement of NATO- contributed to renew tensions between Russia and the West.<sup>8</sup>

The impact of OAF on the future of Kosovo could hardly be underestimated. Even if we accept that ‘the creation of the state of Kosovo can only be attributed to the post-conflict legal arrangement established by Resolution 1244’,<sup>9</sup> it is clear that without the NATO intervention it would not have been possible to adopt any Security Council resolution; therefore others could argue that OAF had been ‘a watershed event which made independence before possible and then real’.<sup>10</sup> Unsurprisingly, the campaign was at the heart of a harsh debate concerning its lawfulness, at least as intense as it is nowadays with the UDI. At the time, some scholars envisaged a sort of revolution in the international application of human rights standards.<sup>11</sup> Ten years later, and despite further, major humanitarian crises, OAF remains a unique case, which does not suggest of any new customary rule in the enforcement of basic standards of human rights.<sup>12</sup>

Western internal criticism was widespread, and much differentiated. A number of supporters of the campaign criticized its operational rationale, arguing that OAF was not, and could not be, aimed at stopping violence against ethnic Albanians.<sup>13</sup> Such a task could have been accomplished by a greater commitment of intervening parties, which had probably to include the deployment of ground troops. From a strictly legal standpoint, the main contention is that regional organizations, to which a defensive alliance like NATO could be assimilated, have an obligation -under the UN Charter- to restrain from the use of force unless so allowed by the SC.<sup>14</sup> Another stream of critics, came from those idealists who found hard to believe that human rights (“equal and inalienable”)<sup>15</sup> can be defended when at the same time they are being violated.<sup>16</sup> It should be also reminded that NATO, in its history as a military alliance, never had human rights on its agenda. A sudden -and outlaw- humanitarian operation had to undertake the risks of raising serious doubts of legitimacy, which ten years later have not yet dissipated.<sup>17</sup>

Western countries had to mount a huge media campaign in order to secure internal support for war,<sup>18</sup> which was arguably low. In some countries, the OAF engagement was even raising doubts of unconstitutionality.<sup>19</sup> The “humanitarian mission” was not at all different from other war operations: “intelligent missiles” were not so “smart”, and the “collateral damage” amounted to hundreds of civilian losses on both sides. It is also a fact that the major humanitarian crisis (an estimate of 800.000 refugees and 500.00 internally displaced) occurred *after* NATO started the air strikes. All the more, NATO made use of weaponry -such as cluster bombs and depleted uranium- ‘of questionable lawfulness’.<sup>20</sup> It must finally be recalled that OAF actually paved the way for an Albanian backlash vengeance. During and following to the end of the operations, at least 200.000 among Serbs and other ethnic minorities had to flee Kosovo in fear.

8. Cottey (2009), at 601.

9. Vidmar (2009), at 827.

10. Mertus (2009), at 476.

11. See Cassese (1999).

12. See Hehir (2009).

13. Charney (1999), at 1237.

14. UN Charter, Art. 53.

15. *Universal Declaration of Human Rights, Preamble.*

16. See Gambino (2001); Koskenniemi (2002).

17. It is memorable the discourse of President Clinton: ‘[N]ever forget if we can do this here, and if we can say to the people of the world, whether you live in Africa or Central Europe, or any other place, if somebody comes after innocent civilians and tries to kill them en masse because of their race, their ethnic background or their religion, and it’s within our power to stop it, we will stop it’. Quoted in Hehir (2009), at 260.

18. Schnabel and Thakur (2000), at 11.

19. Convincing arguments in this sense may be advanced *vis-à-vis* Italy (Art.11: ‘Italy repudiates war as a means of dispute settlement’), and Germany (Art. 26, 1: ‘Acts intended to disturb peace shall be unconstitutional’) at least.

20. Falk (1999), at 851.



Of course, that is not to say that the intervention was completely ineffective: it concretely put an end to Serbian violations of human rights and practice of ethnic cleansing. However, NATO countries could not articulate specific and compelling legal justifications for the intervention, and questions arise on whether it was a proportionate measure, justifiable under the *jus ad bellum* principles. Some scholars have even doubted as a whole that OAF was waged on purely humanitarian grounds, pointing at concrete, external national interests which could have been at stake.<sup>21</sup> Be things as they may, the ethical appeal of the operation remains ultimately a subjective question. The fact remains that, notwithstanding a diffuse political and moral endorsement, echoed in the Report of the Independent Commission on Kosovo,<sup>22</sup> OAF was recognized as a plainly illegal act, which, due to the immensely superior potential of NATO military forces, many saw as a collective punishment of the Serbian population as a whole.

### C. The UN-led post-conflict management

The day after Milošević capitulated, June 10 1999, it was possible to pass S/Res/1244 which re-conducted the situation in Kosovo under the “UN umbrella”. At the moment, it was considered as a masterpiece of diplomatic efforts, having managed to break the SC impasse on the situation of Kosovo, but with time, it proved to be frail and flawed by ambiguities. In the document, the Security Council members -after expressly reaffirming ‘the commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia’<sup>23</sup> established an international civil administration which resulted to be a multi-task mission of high complexity. UNMIK, again with little precedent –in the history of UN peacekeeping missions at least- was vested with extensive powers and an open mandate.

In short, the UN were assuming the burden of administering and managing the entire institutional structure of the territory, while at the same time ‘[p]romoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo’.<sup>24</sup> UNMIK therefore retained all competences in matters of police, justice and civil administration, while security, economic development and reconstruction, democratization and institution building were demanded to distinct international bodies (respectively NATO, EU, and OSCE). Being directly under the supervision of the Secretary General through a Special Representative (SGSR), UNMIK concretely operated a shift of sovereignty, which from Serbia was passed to the UN, as in the case of non-self governing territories.<sup>25</sup> Others instead argued that ‘[o]n 10 June 1999, the Security Council disaggregated sovereignty over the territory of Kosovo into formal title (left with Serbia as *nudum ius*), material interest (accorded to a people with “unique historical, legal, cultural and linguistic attributes”) and governing power (vested in UNMIK)’.<sup>26</sup> UNMIK was finally invested of the uneasy task of ‘[o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government’, ‘[f]acilitating a political process designed to determine Kosovo’s future status’, and ‘[i]n a final stage, overseeing the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement’.<sup>27</sup> In the whole process, UNMIK had also to comply with a policy of neutrality with respect to the final status, which had to be decided -as it was mentioned- through “a political process” by the parties themselves. With the creation of the Provisional Institutions of Self-Government (PISG), in 2001, UNMIK started to progressively transfer the authority to local actors, in order to realize a meaningful degree of self-government as

21. O’Neill (2002), at 17.

22. *Independent International Commission on Kosovo: The Kosovo Report*, (2000) available online at <http://www.relieffweb.int/library/documents/thekosovoreport.htm> [last accessed 13/12/2009].

23. The Federal Republic of Yugoslavia disappeared in 2006, after the peaceful secession of Montenegro. Serbia is its successor state.

24. S/Res/1244, para. 11 (a).

25. ‘UNMIK has raised taxes and issued stamps [...]; it has changed the currency and replaced the Serbian flag and all symbols of Serbia with UN regalia; it controls borders issues identity documents and enters into agreements with States’. Goodwin (2007), at 7.

26. Knoll (2009), at 383.

27. S/Res/1244, para. 11 (c), (e) and (f).

envisaged by the Rambouillet Accords and by S/Res/1244 itself. The Constitutional Framework, under which this transfer was made possible, stated clearly that the final authority in Kosovo remained the SGSR, who maintained key competencies in assuring the full respect of S/Res/1244.

Notwithstanding the immense efforts, the general conditions of the society in Kosovo were improving slowly. Inter-ethnic relations remained tense at best. Serbs were concentrated in the Northern Mitrovica area, which was *de facto* under Belgrade's authority, while in the south they were relegated in guarded enclaves, with serious restrictions of movement and access to facilities. The international ideal of a multi-ethnic Kosovo apparently was not adherent to reality: security conditions remain particularly tough for minority communities, Serbs and Roma especially. Acts of intimidation and ethnic violence have been reported throughout the past 10 years. In 2004, a series of coordinated violent actions in the whole Kosovo showed once more the difficulties which the international oversight was to face: the balance was of 19 human losses and massive spoil of Serbian cultural heritage. Other issues which remain problematic for minority members concern justice and freedom of movement. The judicial system, in particular, was one of the worst aspects during the international administration years. Ex-KLA members for years kept undermining the justice machine by the way of physical intimidation and targeted murders. The international administration was not spared from harsh critics, in particular about the extensive prerogatives and immunities of its officials,<sup>28</sup> while the whole UNMIK system was referred to in terms of a Central Asian-like absolutist regime.<sup>29</sup> It is of course remarkable that under UNMIK and KFOR the security situation remained generally stable, but it is equally true that it never really normalized. The demilitarization of the KLA proceeded hurriedly, while their members either were enrolled into the Kosovo Police Service or directly entered in politics.<sup>30</sup> All considered, the demilitarization of society has been another major failure of the international administration.<sup>31</sup>

In these difficult conditions, the UN initially decided to adopt a "standards before status" policy, meaning that advancements in key sectors of society -such as the rule of law, non discrimination, democratization etc.- should have been achieved before entering the final status process. However, in 2005 the UN Special Envoy Kai Eide, remarking that improvements in standards were proceeding slowly, nonetheless urged to initiate the final status talks. After several rounds of negotiations in which the diametrically opposed views of the parties -supported by the ambiguous wording of S/Res/1244- could not bring to any result, and lacking again a consensus in the SC, on March 25 2007 the UN SGSR Martti Ahtisaari delivered its *Comprehensive Proposal for the Kosovo Status Settlement*, in which he was acknowledging that independence was 'the only realistic option', and therefore presented it as the most viable solution, even though 'supervised initially by the international community'.<sup>32</sup> The Ahtisaari Plan was aimed at regulating all aspects of the internal life to ensure that the final status process would lead to statehood.<sup>33</sup> Being the outcome of this proposal at odds with a strict interpretation of S/Res/1244,<sup>34</sup> it is unsurprising that Russia blocked its endorsement in the Security Council. In view of the events, the document remains a proposal of high political significance -especially if looking in hindsight- but all considered of scarce legal relevance.

28. Among other things, the "Ombudsperson noted that the purpose of granting immunity to international organizations is to protect them from governmental interference in the territories there where they are based, and that a wide grant of immunity is illogical in cases such as Kosovo where an international organization serves as a governmental actor". Everly (2007), at 32.

29. Maciej Zaremba, 'Report from Unmikistan', online at <http://www.dn.se/kultur-noje/debatt-essa/part-1-report-from-unmikistan-land-of-the-future-1.732443> [last accessed 02/12/2009].

30. The image of a monolithic structure for KLA should not be overestimated. In the years 1996-1999 emerged several paramilitary units only generically pursuing the same objective. See Koktsidis and Ten Dam (2008).

31. In 2006 there were an estimated 400.000 weapons on a population of about 2 millions. Of these, only around 40.000 were regularly registered. Forum for Civic Initiatives (2008).

32. *Report of the Special Envoy of the Secretary General on Kosovo's Future Status*, S/2007/168/Add.1 (26 March 2007).

33. D'Aspremont (2007), at 658.

34. See below, Section II.B.

#### D. The UDI and the international reactions

A final round of negotiations in Vienna, biased by the reassurance of Western countries to support the final independence of Kosovo, could not result in any agreement whatsoever between the parties. Therefore, as it was mentioned in the opening, when the Assembly of Kosovo solemnly proclaimed its independence, the new state was soon recognized by a conspicuous number of states, most of them gravitating in the Western sphere of attraction. It was hardly a mystery for anybody, since the declaration itself was programmed and previously agreed upon with Western chancelleries.<sup>35</sup> Comprehensibly, Serbia immediately declared the UDI null and void, in an attempt of safeguarding its *de jure* sovereignty over the territory, while Russia considered it “a violation of international law”, letting intend that it would not tolerate Kosovo to apply for UN membership. Such a stance was interpreted by the Western partners of the informal mediating group (the Contact Group: USA, GB, France, Germany and Italy) as a sort of betrayal on behalf of Russia, or alternatively as a Russian over-projection into European regional affairs. Nonetheless, other prominent nations and emerging powers (China, India, Brazil) also refused to back the unilateral move to independence; equally, concerns about the opportunity of such one-sided solution refrained the Arab League and the Organization for the Islamic Conference from fostering collective recognition of Kosovo among their member states.

However, of even more importance for the regional context is the fact that a sizeable minority of EU countries is firmly portraying the unilaterally declared independence as contrary to international law.<sup>36</sup> Their arguments are slightly different (as distinct are the political reasons which account for their negative stance in front of other EU members), but all of them substantially point out that declarations of independence are -and should be- subject to international law, which rejects unilateral secession, except under extreme circumstances;<sup>37</sup> and that, in the specific case, Kosovo authorities were to act within the framework of S/Res/1244, which did not provide any ground against the territorial integrity of former Yugoslavia. On these premises -and especially made strong by Russian unconditional support in the SC- Serbia managed to request the International Court of Justice (ICJ) for an advisory opinion on the legality of 8th UDI, which will surely shed some light on the question, and to some extent orientate the future course of international legal developments.<sup>38</sup> Interestingly enough, a few countries which had already recognized Kosovo endorsed the motion, confirming that in such cases political discretion does not coincide with a position that necessarily ranks into international legal reasoning.<sup>39</sup> In the while, the Assembly of Kosovo, once again with the support of international legal experts,<sup>40</sup> approved the Constitution of Kosovo on June 15 2008. This resulted in a further complication of the legal framework of Kosovo. In fact, the Constitution which is normally the ultimate source of law in a state's legal hierarchy, was made explicitly subject to the Status Settlement proposed by Ahtisaari.<sup>41</sup> It also established that the International Civilian Representative (ICR) would have ample discretionary powers. Remarkably, all mentions to S/Res/1244 and UNMIK disappeared, evidence that the drafters of the Constitution were aware that the whole constitutional process was at odds with the provisions of the SC Resolution.

Some scholars, arguably supporters of a true independence, have criticized the Constitution on the basis that it ‘will largely allow international politics to dominate Kosovo's future’.<sup>42</sup> Others, even more subtly, remarked that ‘predetermining boundaries within

35. Benedek (2008), at 397; Vidmar (2009), at 783 and 804.

36. Namely Spain, Greece, Slovakia, Romania, and Cyprus.

37. Section II.D, below, provides more details about remedial secession theory.

38. GA/Res/63/3, adopted on 8 October 2008 by 77 votes in favour, 6 contraries, and 74 abstained. The question was worded as follows: ‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’

39. Costa Rica, Iceland, Liechtenstein, Norway, and Senegal voted in favour of the motion, even though they had already recognized Kosovo. Montenegro also voted in favour: it recognized Kosovo the day after (9 October 2008).

40. Knoll (2009), at 381.

41. *Constitution of Kosovo*, Art. 143 (2-3).

42. Vogel (2008), at 5.



which a constitution [...] is to be framed appears designed to confiscate the right to internal self-determination from a freshly liberated people *before* they have constituted themselves in freedom'.<sup>43</sup> Be things as they may, as it was mentioned the number of countries that recognized the present state of Kosovo has reached 69, that is, more than a third of the total UN members. The SC did not issue any duty of non-recognition, which would be expected in cases of severe breaching of peremptory norms of international law (*jus cogens*). While such developments can be interpreted as an assurance that Kosovo has been put on a secure trajectory to statehood, it will actually remain in the legal limbo of partial -or *de facto*- statehood, which is something obvious given the tenor of the controversy. In such instances, external recognition remains at disposal of states on political or strategic grounds, in line with the declaratory theory.<sup>44</sup> It would be misleading, however, to consider the external recognitions of Kosovo as in full accordance with the declaratory theory. That would imply that Kosovo was already a state when it was recognized, while it seems more respondent to reality the fact that Kosovo was 'to be *constituted* as a State'.<sup>45</sup> On the basis of the prohibition of premature recognition of new sovereign entities, a duty of non-recognition could have been opposed to recognizing states,<sup>46</sup> but this is once more a matter left to the discretion of sovereign states.

It seems important at this point to underline that 'most of the States that give reasons for their decision have preferred to stress different political considerations without going into details about international law regarding the general terms and conditions of secession, including possible exceptions'.<sup>47</sup> In such instance, a semi-constitutive theory of recognition possibly provides a more accurate explanation of the observed phenomenon.<sup>48</sup> External recognitions would have been accorded in this case as a political act endowed with some prospective or "residual" legal effects. This is an additional proof of how –in this field of international relations- legal and political reasoning converge or overlap. However, as the ICJ stated in *Legality of the Threat or Use of Nuclear Weapons*, the fact that an issue keeps holding political importance does not deprive it of its legal nature.<sup>49</sup> The purpose of the following section will be therefore to investigate what possible legal grounds can be of relevance in the instance of Kosovo's independence.

## 2. The legal grounds of the unilateral independence

### A. Self-determination and territorial integrity under general international law: relevance for the Kosovo case

The decade of the 90's will remain known in history as a peak season of successful secession movements, which -under different conditions, for distinct reasons and by various means- were capable to establish new sovereign polities separating them from their parent states, and managed to gain full admission to the interstate community. Obviously, this cast renewed attention on the issue of self-determination, which since the end of the decolonization process had apparently become a right deprived of its universalistic character and with few legitimate claimants left. Since it was mentioned in the UN Charter,<sup>50</sup> the principle (thereafter right) of self-determination of peoples has been recalled in numerous international legal documents. Its universal character was reaffirmed in the twin Covenants of 1966,<sup>51</sup> but its scope and applicability was rather circumscribed to peoples inhabiting either an independent state or a non self-governing territory. In a few words, self-determination could not interfere with the fundamental

43. Knoll (2009), at 381.

44. The declaratory theory considers recognition as non influential on the statehood of a prospective state. On the contrary, the constitutive theory sees external recognition as central to the process of acquiring statehood. Crawford (2006), at 19-26.

45. Warbrick (2008), at 682.

46. Raič (2002), at 92-93.

47. Almqvist (2009), at 8.

48. Schoiswohl (2004), at 39 and ss.

49. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996-I), para. 13, at 233-234.

50. Charter of the United Nations, Art. 1 (2) and Art. 55.

51. *International Covenant on Civil and Political Rights*; *International Covenant on Economic, Social and Cultural Rights*, common Art. 1.

rules of international order, namely state sovereignty and territorial integrity. Within these limits, starting from the 60's it passed to be the legal and philosophical basis ruling the decolonization process that was central in the next decades.<sup>52</sup>

The majority interpretation, for the sake of self-determination, was basically the next: where is a state, there is a people -which stood in a controversial relation with the universality of the principle. The process of decolonization, conducted abiding to the principle of *uti possidetis*, led instead to a situation in which it was even more manifest that the world was comprised of states hosting a plurality of peoples, to which the right of self-determination would have to be equally granted. The fact that states could often be accused of realizing the self-determination project of a single national community -usually the majority group- over the others (through policies of cultural assimilation, denial of autonomy, etc.) forced the international community to somehow modify the application of self-determination. In the 70's, the perception of a need to better guarantee the rights of peoples led to a first departure from the precedent doctrine. In the 1970 so-called *Declaration on Friendly Relations*, the reaffirmation of the principle of territorial integrity was followed by an important *caveat*, the so-called "safeguard clause", which was apparently meant to limit the obligation of respecting the territorial integrity to 'States conducting themselves in compliance with the principle of equal rights and self-determination of peoples [...] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.<sup>53</sup>

The 1970 safeguard clause was then re-framed and solemnly recalled in the *Vienna Declaration and Programme of Action* of 1993. After affirming the principle that peoples can take 'any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right to self-determination' -whose denial would amount to a violation of human rights- it confirmed that a duty to respect the territorial integrity would apply for those states 'possessed of a Government representing the whole people belonging to the territory without distinctions of any kind'.<sup>54</sup> On the one hand, this *caveat* paved the way for the contemporary success of the remedial secession theory. However, it has to be acknowledged that the concrete application of the clause in international relations has proved to be rather difficult. In the few (national) sentences in which this principle has been recalled, the Courts 'simply proceeded on the assumption that the governments in question were representative'.<sup>55</sup> On the other hand, as Vidmar explains, '[t]he territorial integrity limitation effectively divorces the right of self-determination from the notion of a right to secession, thus establishing a distinction between internal and external self-determination'.<sup>56</sup> Provided that not only the task of defining a people is complicated, yet never fully clarified, but that in some cases it is even difficult to distinguish a people from an ethnic minority,<sup>57</sup> it is evident the reason why the international community has actively advocated for the promotion of internal self-determination, as a way to avoid major territorial changes and subsequent threats to peace. This interpretation has left to states themselves the chance of accommodating claims to self-determination through internal arrangements (from recognition of cultural rights, to different models of autonomy, and up to different federal-type arrangements).

While there is a considerable track of successful accommodation of self-determination conflicts, also in recent times,<sup>58</sup> it is equally true that secessionism and separatism continued to have large following, often (but by no means always) as a response to state

52. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, A/ Res/1514 (XV), 14 December 1960, para. 2.

53. *Declaration on Principles of International Law, Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations*, A/Res/2625 (XXV), 24 October 1970.

54. United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc. A/ CONF.157/23 (1993), para. 2.

55. Summers (2007), at 344.

56. Vidmar (2009), at 808.

57. *Ibid.* at 812.

58. Weller (2009).

violence, past injustices, ineffective protection of minority rights, or denial of internal self-determination, that is, lack of government representativeness. Indeed, if anything is true, 'Kosovo is not unique in becoming well-known for suffering the repressive actions of a parent state'.<sup>59</sup> It is, instead, a clear example of how '[m]inorities appropriate the vocabulary of self-determination whether governments or scholars approve it or not'.<sup>60</sup> But the justification of secession on the basis of self-determination has been avoided under general international law by interpreting the provisions of self-determination as if they can hardly annul the customary norm of territorial integrity. As it will be clarified below, international law does not permit nor prohibit secession, '[y]et there is a clear bias against it'.<sup>61</sup> Benedek contends that Kosovo could be one of the first cases in which the balance between sovereignty of states and sovereignty of peoples would be shifting towards the latter.<sup>62</sup> While this could be surely considered a positive effect of the case, the validity of such assertion will have to be counter-checked in the medium period, together with the viability of the new state. At this stage, it seems still reasonable 'to avoid avoiding the question of how Serbia lost its title simply by postulating a new status for Kosovo which requires (but does not explain) the termination of Serbia's rights'.<sup>63</sup> In the following paragraphs, some of the legal grounds for asserting the independence of Kosovo will be examined, starting from its compatibility with Resolution 1244.

#### B. The institutional framework of Resolution 1244

As it has been implied in precedence, from a legal standpoint, S/Res/1244 is the main obstacle to the independence of Kosovo. It is clear that the document in no place gave dispositions for the timing or the outcome of the status process. In this sense, it can be accepted that it neither provided nor excluded that Kosovo could achieve independence.<sup>64</sup> On the one hand, such ambiguity favoured those international actors who decided to support the independence: since secession had not been explicitly banned, it was argued, the self-proclaimed independence of Kosovo could also be freely recognized. On the other hand, the non-recognition party stresses that, according to the resolution, the final status had to be negotiated and in no case could be acceptable a unilateral modification to the status of Kosovo, in absence of Serbia's consent at least. Common sense suggests that, despite the ambiguities, it is not possible to accept that a legal document -which had been previously agreed- can provide two mutually exclusive legal outcomes.<sup>65</sup> Perhaps, in order not to incur in the political impasse experienced in the following negotiations, a surplus of good faith could have helped both the local parties and their international counterparts to find some sort of accommodation. Probably, more attention should have been posed to the procedural steps, in order to achieve a shared vision about the final status process. The crucial passage in this sense seems to be contained in the provisions of Annex 2, which prescribes in its opening that (emphasis mine) '*Agreement should be reached* on the following principles to move towards a resolution of the Kosovo crisis', one of those principles being (again, emphasis mine)

[a] *political process* towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, *taking full account* of the Rambouillet accords and *the principles of sovereignty and territorial integrity* of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.<sup>66</sup>

59. Goodwin (2007), at 1. This opinion is shared by Warbrick who states that '[t]he repression of the Kosovars up to 1999 was pretty exceptional but by no means unique'. He further notices that, while a few Serbs were indicted before the ICTY for crimes against humanity and war crimes, '[i]t is notable that no Serb was indicted [...] for genocide in Kosovo'. Warbrick (2008), at 680.

60. Thornberry (1989), at 867-868.

61. Slomanson (2009), at 11.

62. Benedek (2008), at 682.

63. Warbrick (2008), at 682.

64. Borgen (2008).

65. Orakhelashvili holds that since Security Council Resolutions are "in substance agreements between states", they should be assimilated to international treaties. In this sense they would be subject to the principles of interpretation provided in the 1969 Vienna Convention on the Law of Treaties. Orakhelashvili (2008a), at 32.

66. S/Res/1244 (1999), Annex II, para. 8.

The locution “political process” does not seem to envisage unilateral solutions whatsoever. At the same time, it can be safely inferred that the negotiations did not anyhow disrupt the establishment of self-governing institutions.

Someone has argued that the commitment to the territorial integrity of Yugoslavia was only contained in the preambular language, it was in other words envisaged just *pro forma*. However, the references to the territorial integrity of Yugoslavia are repeated many times not just in S/Res/1244, but also in precedent SC resolutions, in the same Rambouillet Accords, up to Resolution 1785 (2007) which was expressly reaffirming the territorial integrity of all states created on the territory of the former Yugoslavia.<sup>67</sup> The fact that Resolution 1244 was adopted under Chapter VII of the UN Charter, adds one more reason to doubt about the legality of a unilateral arrangement. Arguably, a change in Kosovo status -which is formally under an interim international administration- should be subject to a confirmation on the basis of a new SC Resolution; which is, of course, an eventuality that can still occur in the future, on the basis of an agreement on either the local or the international plane.

Robert Muharremi holds that ‘[i]f a resolution like Resolution 1244 is ambiguous and, as such, offers different possible interpretations, the interpretation that best ensures the compatibility of the resolution with international *ius cogens* must apply’.<sup>68</sup> Therefore, he holds, if Kosovo Albanians are found to be qualifiable for external self-determination, ‘Resolution 1244 must be construed in such a manner that it does not constitute a barrier to the exercise of such a right’; on the other hand, if they are not entitled to this right, the declaration of independence itself ‘would have to be declared in violation of international *ius cogens*’.<sup>69</sup> Similarly, Enrico Milano considers that S/Res/1244 does not rule out the option of independence, which should have been, however, the result of a “political settlement”, rather than a unilateral act. But even if it is accepted that Kosovo Albanians are entitled to (external) self-determination, supporters of unilateral independence should ‘prove that UN S/Res/1244 has contributed to an oppressive *status quo*, in which the basic rights of self-government of the people of Kosovo are grossly denied’; but the facts rather prove that under the current administration, it is the members of minorities which suffered from ‘isolation, acts of ethnic cleansing and intimidation’.<sup>70</sup>

As it was mentioned, the new Constitution of Kosovo does not make any reference to S/Res/1244 nor UNMIK. In 2001 UNMIK’s Legal Office explicitly ruled out that the Assembly of Kosovo could adopt acts directed at determining Kosovo’s final status; and in the same year, it recommitted to such undertaking in the UNMIK-FRY Common Document.<sup>71</sup> However, since UNMIK is the ultimate authority in Kosovo, subject only to the SG, a charge of legal inconsistency -lacking a political will- would be opposed only in cases of serious and incontrovertible breaches of S/Res/1244. The SG has instead acknowledged that the new constitution has considerably compromised the legitimacy of UNMIK, which is now frequently put in question by the leaders of Kosovo.<sup>72</sup> Some considered this as an implicit consent of the UN to the independence of Kosovo;<sup>73</sup> a similar argument could be advanced about the SC impossibility to endorse the Ahtisaari Plan or annul the unilateral independence. Nonetheless, as it was stated in the ICJ *Namibia* advisory opinion, ‘[t]he fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed’.<sup>74</sup> In such conditions, it seems however that S/Res/1244 -due to an internal split of the SC,

67. S/Res/1785, 21 November 2007, Preamble, para. 2.

68. Muharremi (2008) at 244.

69. *Ibid.*

70. Milano (2008) at 30-31.

71. *Ibid.*, at 33.

72. Knoll (2009), at 382.

73. Benedek (2008), at 403; similarly, Knoll (2009), at 395.

74. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16 et seq. (36, para. 69).



and to political events on the ground- even if still retaining legal validity, is lacking of concrete effectiveness. There is no need to be too pessimistic, but at the moment the UN-led post-conflict management has apparently failed to provide the framework for a stable, multilateral agreement. At this point it seems important to clarify the issue of self-determination with respect to the population of Kosovo.

### C. Kosovo claims to statehood and self-determination

As it was recalled above, self-determination is firmly established in international law, and although its interpretation and application has been sensibly changing over time, it is now accepted as an obligation *erga omnes*.<sup>75</sup> In cases like Kosovo, where the application is unclear and can give rise to different interpretations, self-determination appears particularly controversial and gives rise to so-called “self-determination conflicts”.<sup>76</sup> The question appears to be the following: do the Kosovo Albanians, i.e. the overwhelming majority of the population of Kosovo, qualify as a people for the purposes of self-determination? In 2001, Helen Quane argued that Kosovo Albanians did not qualify as a people for the purposes of self-determination, not even in its internal form. She was basing her considerations on the fact that S/Res/1244 did not explicitly mention self-determination, nor it was making any reference to the “people” of Kosovo: the provisions for self-government, according to her, were to see as an expression of commitment for the respect of minority rights. On this basis, she could conclude that ‘the international response to the Kosovo crisis [...] does little to extend the right to internal or external self-determination beyond the currently accepted beneficiaries of the right, namely, peoples organized as states and colonial peoples’.<sup>77</sup> More recently, Orakhelashvili has expressed positions substantially similar, stating that Kosovo is ‘an entity that claims statehood outside the colonial context and without the consent of the parent state. This [...] confirms that Kosovo is not an entity entitled to self-determination’.<sup>78</sup> Pierre D’Argent equally holds that -from the point of view of international law- it is “certain” that the people of Kosovo is not a people which qualifies for the right of self-determination, and in fact, he claims, the UDI does not make any reference to such principle.<sup>79</sup>

On the other hand, it is clear that for those who back the independence Kosovo Albanians constitute with little doubts a people entitled to self-determination, which can therefore take even its external form. Then a crucial question arises. Since Kosovo Albanians were before considered a national minority, when did they attain the status of “people”, for the purposes of self-determination? The proponents of this idea usually contend that Kosovo Albanians have become a “people” following to the Serbian disastrous policies of the 90’s, and possibly also in reason of the prolonged UN administration. The first justification alone would make the right of self-determination arguably assimilable to the doctrine of remedial secession -discussed in the next paragraph- therefore nullifying the distinction between internal and external self-determination. This is surely contradicted by practical and customary interpretations of the safeguard clause, as discussed above. And -if we have to judge by the recognizing statements- this is not even the intention of the supporters of the independence, which has repeatedly been purported as a unique or *sui generis* solution. Perhaps, then, the first point has to be seen in connection with the second, the UN prolonged administration. This idea does not seem to be solidly grounded as well. First, in the context of the non consensual break-up of Yugoslavia, there is a precedent UN transitional administration mission of a break-away territory which

75. Cf. *East Timor (Portugal v. Australia)*.

76. The claim to self-determination often encapsulates the hopes of ethnic peoples and other groups for freedom and independence. It provides a powerful focus for nationalist fervour, and it offers a convenient tool for ethnic entrepreneurs seeking to mobilize populations and fighters in pursuit of a secessionist cause. Indeed, self-determination conflicts are among the most persistent and destructive forms of warfare. Weller (2009), at 111.

77. Quane (2000), at 227.

78. Orakhelashvili (2008a), at 11.

79. D’Argent (2008), at 3.

was concluded with the return of the province to the legitimate sovereign.<sup>80</sup> Secondly, as it has been contended, such justification could set a very dangerous precedent, which would (further) reduce the cooperation of states regarding the establishment of UN peace missions on territories with active secessionist movements.<sup>81</sup>

The argument of the prolonged duration of self-administration, is also not in itself a valid justification for earning (or losing) an entitlement to external self-determination, since it is clear that a meaningful, or more realistically wide degree of self-government would be bilaterally and internationally guaranteed to Kosovo. By the way, it should be recalled that UNMIK entered in Kosovo very clearly designed as an “interim” administration. It was then agreed by all the parties that its mandate should not be limited by any restraint of time. Friedrich was prompting the idea that a right of secession could have been evolved from a right to internal self-determination.<sup>82</sup> Kosovo would be the first case, Friedrich argues, of a ‘conditional right’ to independence, awarded on the premise of an extraordinary effort of the government to ensure human rights and protection of minorities. However, it seems evident that –apart from pledges of commitment on behalf of Kosovo leaders- remarkable advancements in the mentioned fields are far to be achieved. On the other hand, as Warbrick remarks, there has been no explicit sign of such a conditionality clause on behalf of the recognizing states.<sup>83</sup>

Other commentators, sceptical about a right to independence based on a controversial right to self-determination, nonetheless admit that Kosovo Albanians, in view of their history, have matured a right to self-determination, which however would have to be enjoyed in its internal form. The position can be supported through the Badinter Opinion no.2, in which the Committee considered the Serbian population in Bosnia-Herzegovina and Croatia as peoples for the purposes of self-determination, but at the same time held that such right could not be exercised in its external form.<sup>84</sup> Brown clarified such position holding that ‘[i]n practice, the principle of self-determination has never guaranteed an automatic right to statehood or other forms of external self-determination’. While considering that Kosovo might fall in the case of a people ‘subject to alien subjugation, domination or exploitation outside a colonial context’,<sup>85</sup> he immediately warned that ‘both the principle and its application to Kosovo are disputable’, and that the independence of Kosovo could better be defended on other bases.<sup>86</sup> Vidmar similarly concluded that ‘[a]lthough Kosovo Albanians might qualify as a people for the purpose of the right of self-determination, the applicability of this right does not *per se* suggest that secession can be justified’.<sup>87</sup> Two more considerations contribute to the solidity of this opinion. First, the fact that –as it was said- the UDI, while using the language of self-determination, does never openly mention it. Secondly, the fact that so far only two countries explicitly mentioned self-determination in their recognition statements.<sup>88</sup> It seems therefore safe defending the opinion that even if we accept that Kosovo Albanians qualify as a people for the purposes of self-determination, the unilateral independence of Kosovo can not be regarded as legally grounded on the doctrine of self-determination.

#### D. Remedial secession theory

The doctrine of remedial secession has been implicitly or explicitly invoked by a few scholars in relation to Kosovo, as the source of a legitimate claim to independence.<sup>89</sup> Arguments in favour of this interpretation can be derived from both the UDI and

80. The mission UNTAES (UN Transitional Authority for Eastern Slavonia, Baranja and Western Sirmium), established by S/Res/1037, was operative between 1996 and 1998. After two years the territories were re-conducted under the jurisdiction of Croatia.

81. D’Argent (2008), at 10.

82. Friedrich (2005) at 251-254.

83. Warbrick (2008), at 686.

84. *Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia*, 11 January 1992, para. 4. Quoted in Jure Vidmar (2009), at 812.

85. *Reference re Secession of Quebec*, [1998] SCR, at 285.

86. Brown (2005), at 251.

87. At the same time, however, he warns that under the current circumstances, a return of Kosovo to Serbia to which Kosovo itself did not consent ‘might violate the applicable right of self-determination’. Vidmar (2009), at 814.

88. Afghanistan (18 February 2008) and the United Arab Emirates (14 October 2008).

89. Benedek (2008), at 398-402; Pippan and Karl (2008).

several recognition statements, although, again, no clear reference has been made in official statements. The acceptance of remedial secession arguments in international legal reasoning can be traced in the mentioned *Declaration on Friendly Relations*. Its success in academic circles –in the context of a wider moral reform of international law- dates back to the 70's, and has sparked wide echo for its unquestionable ethical appealing, even though at the same time it seems mining a basic tenet of international order, namely, the principle of territorial integrity. Conceptually, there are two main problems arising from a translation of this theory into legal provisions. First, there is a feeling that –to be effective- remedial secession should be framed not merely as a liberty-right, which seems to be relatively accepted in international relations,<sup>90</sup> but rather as a claim-right, opposable to the community of states as such. The difficulties concerning such development are self-evident. Secondly, a question arises whether the right would apply retroactively or only to ongoing situations of serious human rights violations. Differently put, what if in the process of “enforcing” a secession, the remedial conditions disappear? Is the right still opposable nonetheless?

It is also worth noticing that several formulations exist of such theory. One of the most influential proponents of the theory, Allen Buchanan, suggests that such a right should be ‘a remedy of last resort against a persistent pattern of serious injustices’.<sup>91</sup> But e.g. Seymour contends to Buchanan that the ‘[t]he injustices do not merely relate to the violation of human rights, to the annexation of territories, or to the violation of previous intrastate autonomy arrangements, for they also stem from a failure to comply with principles such as fair representation and internal self-determination’.<sup>92</sup> And Summers seems to follow this line when he proposes that the remedial theory would apply whenever a state ‘is unrepresentative and excludes or persecutes part of his population’.<sup>93</sup> For such reasons, to what extent such theory is acceptable in international legal reasoning is disputable on the grounds of subjective perceptions. As an example, it can be noticed that while in 1978 Lee Buchheit could affirm that ‘remedial secession seems to occupy a status as the *lex lata*’,<sup>94</sup> in 2008 Pierre D’Argent still maintains that the propositions of remedial secession have remained till now *de lege ferenda*.<sup>95</sup>

The availability of the interstate community to substantiate such principle has been comprehensibly low. Therefore, with respect to Kosovo, the majority of commentators –be they in favour, against, or neutral about the independence- has considered that the justification of secession on the remedial secession theory would suffer from both a lack of significant state practice and other conceptual bias to be specifically invoked. Hilpold, recalling the findings of the Supreme Court of Canada, recognizes that a right to remedial secession ‘has not yet materialized, even though there is a considerable support in academic writing for such a concept’.<sup>96</sup> Milano, instead points to the fact that a recourse to the ethics of remedial secession should be discarded in consideration of the intention of framing the Kosovo case as no legal precedent (or at least as a case so special that it could hardly be invoked as a precedent in future cases). He further notices that ‘[e]ven assuming that the right to remedial secession has crystallised in international law, the very notion of “last resort” option does not seem to fit into the reality of contemporary Kosovo’.<sup>97</sup> D’Argent similarly remarks that the *sui generis* label applied to the case of Kosovo makes such appeal to remedial secession less morally compelling. He also considers that the reality of Kosovo has substantially changed since the regime of Milošević, so that in this case secession does not appear to be a remedy anymore.<sup>98</sup>

90. About the permissiveness of secession in international relations see below, Section III.

91. Buchanan (2004), at 270.

92. Seymour (2007), at 395-423.

93. Summers (2007), at 343-344.

94. Buchheit (1978), at 222.

95. D’Argent (2008), at 4.

96. Hilpold (2009), at 56.

97. Milano (2008), at 26.

98. D’Argent (2008), at 4.

Finally, Vidmar recalls the sentence *re Secession Quebec*, which considered that ‘when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession’.<sup>99</sup> However, also according to him, apart from the lack of state practice, the measure of unilateral secession should be taken into consideration only as a last resort. The current situation in Kosovo instead does evidence that the violations of human rights have ended in reason of the NATO intervention and the subsequent UNMIK mission, and that at the moment Kosovo Albanians prospectively enjoy significant means of self-government, guaranteed by regional and international organizations.

If one can share the opinion that ‘there must be no (further) realistic and effective remedies for the peaceful settlement of the conflict’ in order for the qualified secession doctrine to apply,<sup>100</sup> then it is imperative to determine whether Kosovo falls in this category or not. Evidently, the opinions of the two parties will be -once more- diametrically opposed; there are nonetheless reasonable margins to argue that further attempts could have been made in order to opt out of a sterile zero-sum game. In view of these considerations, the claim to remedial secession results to some extent convincing but it is surely not an uncontroversial legal basis for the independence of Kosovo. Had it been more clearly articulated, it could have constituted a sort of cornerstone for the interstate regime of the 21st century. Instead, portraying as “unique” the secession of Kosovo on the basis of remedial theories risks to appear -to detractors of the independence at least, and paraphrasing Buchanan (who was by the way referring to the OAF)- ‘only the most recent of a series of illegal interventions for which cogent moral justifications *could* have been given’.<sup>101</sup>

#### E. International dispositive powers

A final argument which has found some support among legal scholars regards so-called international dispositive powers, i.e. the power of prominent international actors to impose permanent territorial changes to sovereign entities, or to carve from them new states altogether.<sup>102</sup> According to Crawford, three options for such dispositive powers have been substantiated by relevant practice: a) by the way of multilateral treaties; b) through a show of collective recognition; c) through the exercise of international organizations.<sup>103</sup> All of them could have been applied to the case of Kosovo. The first option could have been implemented by the way of a multilateral imposition of the Kosovo independence at the end of the 1999 hostilities, in reason of the FRY’s reiterated non compliance with the UN SC Resolutions and attempts of ethnically cleansing the province. Several critics can be advanced with respect to such an imaginative scenario. In the first place, probably the FRY would have not withdrawn if aware of such an extreme design. Secondly, it could have triggered a major crisis between NATO and Russia. Thirdly, such option would have clearly constituted a power stance, not in line with general trends of international practice. On the other hand, at the time this option could have been regarded as a more logic conclusion to the humanitarian war than it is today endorsing the independence of Kosovo from... the UN international administration.

The last option would arguably vest the Security Council with the power of sanctioning the independence of Kosovo. In this case, the SC would act in relation to the broadest interpretation of Chapter VII provisions. However, as Knoll evidences, ‘[a]side from the political impasse in which the Security Council was locked on the issue, such a decision

99. Reference re: *Secession of Quebec* [1998], 2 SCR. 217, para. 134.

100. Raič (2002), at 332.

101. Buchanan (2004), at 275.

102. Crawford (2006), at 503-564.

103. *Ibid.*



would have found no precedent in public international law'.<sup>104</sup> He also maintains that the SC could not issue any Chapter VII provision without the trigger of a real threat to peace.<sup>105</sup> Similarly, Goodwin is of the opinion that '[t]he extent to which imposing a permanent alteration of its borders upon a state without its consent is compatible with the provisions of international law, such as *uti possidetis*, is rather questionable'.<sup>106</sup> With respect to such an eventuality, Judge Fitzmaurice is usually quoted when in the *Namibia* Advisory Opinion explicitly ruled out that the SC could enforce permanent territorial changes on the territory of a member state.<sup>107</sup> Considering the expanded competences that the UN have assumed in the past recent years with respect to territorial administration,<sup>108</sup> it can be argued that the SC could have had the power to convey such a measure. In such a case, as Muharremi remarks, the international consensus would also imply a less strict application of the traditional criteria for statehood, such as independence and effectiveness.<sup>109</sup> Given the divisions in the Security Council itself, this remains a matter of scholarly speculation; it is still clear that such development would have highly widened the SC powers in post-conflict management of territories.<sup>110</sup>

Another, less mentioned option of the case, would have been deferring the issue to the UN General Assembly, under the provisions of S/Res/377 (1950), better known as *Uniting for Peace*. Crawford e.g. recognizes that 'if the Assembly does not possess any broad dispositive powers under the Charter, it is not necessarily contrary to its "constitutional structure" for such powers to be conferred on it'.<sup>111</sup> This would have demanded the whole interstate community to decide on the Kosovo case; which would have surely been an unprecedented solution, but it could have granted the process enhanced legitimacy deriving from a globally crafted solution.

The option of collective recognition is what most closely follows the actual development of the Kosovo issue, where a consistent number of countries, provided that in international organs it is impossible to form a consensus, would act as having dispositive powers. On balance, this seems the best legal account of the independence of Kosovo, although it cannot be considered, of course, an undisputed formula for achieving statehood. First, it has to be recalled that the recognition of Kosovo seems to have a regional, rather than international basis;<sup>112</sup> and while such "regional dispositive powers" could have some effective conflict resolution potential, their application should also possibly fit into a more consistent legal framework than an *ad hoc* basis. In second place, collective recognition in such cases of contested statehood should arguably be brought back to a constitutive recognition theory, which is not very popular in international relations.

More and more options of seeking to justify the independence of Kosovo can be invoked, but all legal grounds seem to be at least questionable. To be more specific, as it has been contended, 'the [legal] theories purporting to justify Kosovar independence are flawed in one major respect', i.e., they 'start by claiming that Kosovar independence is the solution, and continue by offering legal justifications to support this outcome'.<sup>113</sup> If that is the case, the question that we need to consider is the following: are we dealing with a *fait accompli*? In fact, according to majority interpretations of international law, emerging states do not need to demonstrate their own statehood by gathering full international recognition. The next chapter thus starts by seeking to assess the extent to which Kosovo can be already deemed a state, by referring to the so called "criteria for statehood".

104. Knoll (2009), at 385.

105. Ibid.

106. Goodwin (2007), at 13.

107. Legal Consequences (1970), Dissenting Opinion of Judge Sir Gerald Fitzmaurice.

108. Knoll (2009), at 384.

109. Muharremi (2008), at 432.

110. Knoll (2009), at 386.

111. Crawford (2006), at 551-552.

112. Muharremi (2008), at 433.

113. Sterio (2008), at 22.

### III. The secession of Kosovo between law and politics

#### A. Kosovo at the test of statehood criteria

The history, also the recent one, offers plenty of examples of solemn declarations of independence which could not concretize what they were issued for, that is, the admission of the new entity as a full member of the interstate community. The criteria that traditionally new entities have been required to meet -in order to be universally recognized as an independent and sovereign state- were fixed in the 1933 *Montevideo Convention on Rights and Duties of States*; they are generally considered to respond to the principle of effectiveness. The Montevideo Convention set in its first article those characteristics which were deemed necessary for acquiring international personality. Namely, they are: a) a permanent population; b) defined territory; c) a government; d) capacity to enter into relations with other states.<sup>114</sup> Traditionally, these requirements have always been considered in the process of state formation, while they were not disputed anymore later, even if the state had come to visibly lack of them.<sup>115</sup>

With respect to Kosovo, as most commentators recognize, the first two elements would not pose excessive problems: Kosovo has a permanent population, and its borders are historically defined. Although it does not have full control of its territory -the reference is to northern municipalities with a Serbian majority which still depend on Belgrade- in recent practice this has not been considered as a problem for statehood, as it was the case with Croatia in 1992. Instead the last criterion, as Vidmar notices, seems to be self-fulfilling: since Kosovo has already been recognized by a number of states, it has undoubtedly achieved the capacity of entering into relations with them; on the other hand, such capacity is clearly missing *vis-à-vis* those states that chose not to recognize it.<sup>116</sup> The criterion of government -which has been labelled by Crawford as ‘the most important single criterion of statehood’,<sup>117</sup> is the real sore point, in both its aspects of effectiveness and independence. As already noticed with regard to the international dispositive powers,<sup>118</sup> Muharremi considers that, the requirement of effective government might be less strict when the former sovereign has consented to the secession.<sup>119</sup> Arguably, in case of unilateral secessions, like Kosovo, its application should instead be more rigorous.

As Milano holds, under the Ahtisaari Comprehensive Proposal, Kosovo is ‘formally and factually dependent from a group of states’ which constitute the International Steering Group, represented in Kosovo by the ICR, who is doted of the widest powers like adopting or rejecting legislation and removing local officials and politicians.<sup>120</sup> Such complete reliance on external sources of legitimation is echoed in the UDI,<sup>121</sup> and confirmed in the Constitution of 15 June 2008.<sup>122</sup> With respect to this, it has been claimed that the government of Kosovo undertook voluntary restrictions of its sovereign powers, a fact that arguably cannot affect statehood, as it was the case of Bosnia-Herzegovina. However, in the first place it should be noticed that this provision applies when the statehood is not contested, which is not the case of Kosovo. In second place, the restrictions on sovereignty -envisaged in S/Res/1244 and in the Constitutional Framework- were adopted before Kosovo declared independence and they remained in vigour after that, which means that Kosovo ‘did not accept restrictions to independence voluntarily but in order to comply with the pre-existing legal arrangements governing its territory’.<sup>123</sup>

114. *Convention on Rights and Duties of States*, 26 December 1933, 165 LNTS, 19, Art. 1.

115. Vidmar here echoes Crawford reminding of the case of Somalia. Vidmar (2009), at 820 and note 275. Arguably, Kosovo is a State more functional than many other States internationally recognized. The international legal system nonetheless keeps viewing the latter as sovereign States, while the former has still to perfect its statehood under international law.

116. *Ibid.*, at 821.

117. Crawford (2006), at 56.

118. *Ibid.*, at 19.

119. Muharremi (2008), at 426.

120. Milano (2008), at 27.

121. *Declaration of Independence*, para. 12.

122. *Constitution of the Republic of Kosovo*, Art. 147.

123. Vidmar (2009), at 821.

The anomalies of Kosovo include the uniqueness of a sovereign state in which the Constitution is not the first source of law in the internal legal hierarchy. The Constitution in fact explicitly gives precedence to the Ahtisaari Settlement Proposal over all other legal provisions, therefore over the Constitution itself.<sup>124</sup> Furthermore, as Muharremi notices, the institution of the ICR is not envisaged in any UN legal document (such as S/Res/1244 or the Secretary General plans for UNMIK reconfiguration), therefore the relationship between his office and Kosovo rests uniquely upon Kosovo's consent. Such consent could be withdrawn at any time without any legal consequence, depriving the ICR of the functions assigned to him under the Ahtisaari Settlement Proposal.<sup>125</sup> It is possible to argue that Kosovo has obliged itself through the Constitution, however the fact remains that "there is no discrete international law source of these obligations".<sup>126</sup> The criterion of effective government is questionable also on the internal plane. Without entering into detail, doubts arise in relation to a number of sectors of capital importance for the correct functioning of an independent state, like democracy, human rights and protection of minorities, the judicial system, internal order, economic viability.

Since the state system moved from an international order based on effectiveness to one which is increasingly based on legitimacy,<sup>127</sup> besides the traditional criteria for statehood in recent times additional criteria have been spelled out to determine whether or when an entity ought to be recognized as a state. The most influential document in this sense was the 1992 *European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*. While these guidelines, for the precise historical and geographical context in which they were issued, cannot be considered to reflect international custom,<sup>128</sup> they seem to be conveniently applicable to the case of Kosovo. The guidelines indicated the respect for the provisions of the Charter of the United Nations, the Final Act of Helsinki and the Charter of Paris 'especially with regard to the rule of law, democracy and human rights', and guarantees of 'the rights of the ethnic and national groups and minorities'. As mentioned, the effective respect of such guarantees in present-day Kosovo has to be regarded at least with suspicion. Furthermore, the guidelines requested the 'respect of the inviolability of all frontiers which can only be changed by peaceful means and by common agreement', and 'commitment to settle by agreement [...] all questions concerning State succession and regional disputes'.<sup>129</sup> In this case, these provisions for conditional recognition appear to have been completely disregarded, not only and not much by the authorities of Kosovo, but by the recognizing states themselves. In the words of Delahunty and Perez 'no one could plausibly claim that, by recognizing Kosovo, the Western powers were merely acknowledging the existence of an accomplished reality - [...] the Western powers were plainly attempting to conjure the secessionist state of Kosovo into existence'.<sup>130</sup> Pragmatism induces to think that there is no way back from this unilateral step, but whatever its future, at the moment Kosovo appears to be more a "work in progress", a state-building project of part of the international community, than a sovereign and independent state which is being denied full international personality because of the negative stance of a few, stubborn UN members.

## B. Unilateral independence and collective recognition: dealing with a *fait accompli*?

After remarking that the independence of Kosovo did not proceed from the exercise of a right, Pierre D'Argent was asking whether such circumstance prevented Kosovo to achieve, nonetheless, statehood.<sup>131</sup> The answer should apparently be in the negative. The

124. *Constitution of the Republic of Kosovo*, Art. 143 (2).

125. Muharremi (2008), at 431.

126. Warbrick (2008), at 689.

127. Crawford (2006), at 388.

128. Sterio (2008), at 14.

129. *Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 16 December 1991.

130. Delahunty and Perez (2009), at 90.

131. D'Argent (2008), at 4.

simple fact that uncontested legal means to attain independence could not be opposed, does not imply that a unilateral secession cannot be successful in achieving statehood. As Milano explains

the act of secession may be originally illegal, yet international law may come to accept the originally unlawful situation through prescription, recognition and acquiescence, when the putative state is fully effective and independent and acts in conformity with international standards in the field of human rights and rights of minorities so to acquire international legitimacy.<sup>132</sup>

It is common speech that general international law is neutral with respect to secession, that is to say, law is unable to declare a secession legal or illegal, even though it has to acknowledge the facts resulting from a secession. This opinion is rather consolidated, notwithstanding the fact that the interstate community has sought by all means to conjure unwanted detachments of territory, so that the respect of territorial integrity has been considered -in customary international practice- an obligation *erga omnes*. D'Argent explains the rationale of such "forgetfulness" under the following, subtle line of reasoning: should states -which so far remain the most prominent subjects (and makers) of international law- explicitly forbid minorities to secede, they would somehow contribute to objectify their very personality, which in turn could leave them more space to advance a secessionist bid; that is to say, forbidding is admitting an eventuality which states do not even want to consider.<sup>133</sup> A meaningful rejection of this interpretation is provided by Orakhelashvili, who maintains that international law explicitly rules out unilateral secession as a way of achieving (legitimate) statehood.<sup>134</sup> This approach privileges lawfulness over effectiveness, which was the dominant paradigm in the pre-1945 period; at this regard, Crawford's comment is worth of mention:

Since 1945 the international community has been extremely reluctant to accept unilateral secession of parts of independent States if the secession is opposed by the government of that State. [...] Since 1945 no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State. By contrast there are many examples of failed attempts at unilateral secession, including cases where the seceding entity maintained *de facto* independence for some time.<sup>135</sup>

The fact that Serbia upholds to the principle of territorial integrity -and more importantly, that is solidly backed by a permanent member of the Security Council- will then make hard for Kosovo and its supporters the way for definitive statehood, including the admission to the United Nations. Thus, while on the one hand the programmed UDI was a sort of 'shot in the dark',<sup>136</sup> on the other hand it was a carefully planned act, which sought to evidence the fact that Kosovo's bid for statehood can count with a large number of supporting states. As Ahtisaari dared to notice 'It really doesn't matter if Paraguay hasn't recognised. Well over 65% of the wealth of the world has recognised. That matters.'<sup>137</sup> Without going as far as undermining the idea of sovereign equality of international actors, the large number of recognitions cannot be, of course, underestimated. But however important the external recognition, the political nature of this power stance results more and more evident.

The foreign diplomatic efforts and the stream of recognitions -which was not explicitly portrayed as a decision of collective recognition- were all arguably aimed at cementing the irreversibility of the independence of Kosovo without having to negotiate with a

132. Milano (2008), at 27.

133. '[...] interdire aux minorités de faire sécession revient à les personnifier à rebours, alors que les Etats qui font le droit international ont tout intérêt à ce que ce droit nie autant que possible leur subjectivité afin de prévenir les démantèlements territoriaux dont ils seraient victimes. Interdire, c'est admettre une éventualité tout en voulant l'éviter, c'est entrer dans le monde du possible. Comprendre ce qu'ils sont, les Etats préfèrent ignorer ce possible.' D'Argent (2008), at 5.

134. Orakhelashvili (2008a), at 8-10.

135. *Ibid.*, at 390.

136. Jia (2009), at 36.

137. 'Kosovo state inevitable, says Nobel laureate', *The Guardian*, 18 October 2008. Online at <http://www.guardian.co.uk/world/2008/oct/18/kosovo-serbia-martti-ahtisaari> [last accessed 02/12/2009].



large part of the international community contrary to this solution. Recognition, in particular, once accorded can be hardly withdrawn, and in this sense there seems to be really little way back. Being things as they are, at the moment it is just possible to admit that international law remains somehow lame on this subject, which is still very much regulated through international power politics. In this lays the importance of the imminent ICJ advisory opinion: it will undoubtedly constitute one of the most important international legal documents coping with the fundamental issue of admission of new entities to the interstate community.

### C. The political grounds of the independence of Kosovo

In the previous pages, a case has been made that the justifications for the independence of Kosovo cannot be grounded on a very persuasive legal basis. It has been also acknowledged that the issue of state creation, as other highly sensible matters of international relations, rests upon a swinging balance of legal and political arguments. It was contention of this article that in the singular case of Kosovo, the justifications for a collective state creation - even when mantled under “legalese” speech- have seemingly to be sought in more genuine political reasoning. This is not necessarily detrimental to the cause of an independent Kosovo, since it is arguable that political reasoning leaves more space to defend such option than a strict legal reasoning would; such one-sided development is instead detrimental to the idea that international law -as it is framed today- serves the cause of international peace and security. Discussing in detail the political dimension of the status settlement evidently lies outside of the purposes of this paper; however, in order to illustrate some partial conclusions, a few considerations are worth of notice. The main political argumentations for the opportunity of recognizing Kosovo can be inferred by the recognition statements themselves. Mostly, the independence solution is claimed to be the best political option in view of either the ‘prospect of peace and security in the Balkan region’, the ‘failed negotiations between Pristina and Serbia’, or ‘the claim that Kosovo constitutes a *sui generis* case, i.e., a class of its own’.<sup>138</sup>

The first point encompasses a set of delicate regional issues, especially in light of the common place that the stability of Europe relies on the stability of the Balkans. Firstly, as Goodwin puts it, ‘[t]o accept that the failure to achieve independence will cause the majority Kosovar-Albanians to express their displeasure by violent means and thereby undermine international peace and security is to accept a form of blackmail that the Security Council should arguably not seek to encourage’.<sup>139</sup> Secondly, the security of Kosovo will have to be granted, still for a long time, by a considerable international military and civilian presence: the price of such international supervised independence is for the Albanian community a surrogate of sovereignty and self-determination, and for the EU, a complex, costly, and long-lasting mission of institution-building. With the result that any false step in this mechanism is capable of turning the country (and the region) into a powder keg. In third place, it is a fact that carving a new ethnic state in the Balkans does little or nothing for the reconciliation process. Finally, one has at least to notice that the stability of Kosovo achieved through unilateral independence might signify new troubles for Bosnia-Herzegovina, as it resulted evident<sup>140</sup> in the course of 2010.

The point of the failed negotiations is, at best, a matter of perspectives. By the moment that the project of an independent Kosovo was endorsed ‘even while final status nego-

138. Almqvist (2009), at 8.

139. Goodwin (2007), at 15.

140. Andrea Rossini, “Etnopoli” (29 January 2010), available online at <<http://www.balcanicaucaso.org/ita/aree/Bosnia-Erzegovina/Etnopoli>> [last accessed 10/07/2010].

tiations were still ongoing’,<sup>141</sup> there are strong reasons –despite the solemn proclaims contained in the UDI- to doubt of a genuine good faith on behalf of the Albanian negotiators. There is also ground to reject the idea that the commitment of the Contact Group to respecting “the will of the Kosovo population” should be interpreted as if the Albanian community could actually decide autonomously about its future status. Would it be so, the reasons of holding a negotiation process would have lost all significance. But if at worst Albanians would have to be entitled to a full exercise of self-determination, this should have probably better been implemented by the way of a popular consultation with different status options (full independence, free association, enhanced confederate status, partition on the *de facto* line, union with Albania, etc.).

Finally, there is the *sui generis* argument, that is to say, the argument of the uniqueness of Kosovo. One should remind that the same Western countries that throughout the 90’s (and beyond) ‘adamantly insisted that the former internal administrative borders of Yugoslavia were sacrosanct and could not be breached, no matter how compelling the demands for their revision’,<sup>142</sup> have suddenly decided to pursue and advocate for a policy which apparently nullifies years of political, legal, diplomatic and military efforts in the territory of the former Yugoslavia. At the same time, together with Bruno Coppieters, one has to recognize that ‘[i]t is intriguing in itself to learn why the EU keeps talking about a unique case and not about an exceptional case. A simple answer is that unique cases do not refer to general principles, whereas exceptions do.’ Thus the independence of Kosovo should have been portrayed as ‘exceptional but not unique’.<sup>143</sup>

With regard to this process there are two considerations to do, which share a common premise. The premise is that –honestly speaking- one cannot completely exclude that independence was the only viable solution for Kosovo, since it might be true that the Kosovo case comprised a constellation of facts unlikely to repeat.<sup>144</sup> But besides procedural doubts, we still have to acknowledge that, first, there may be other cases in which secession might be the only viable solution, be it on legal or political grounds, through enforcement, supervision or other ways of implementation. There might be cases, in the contemporary international stage, in which independence might be more clearly suited as a claim-right than it was in Kosovo. Secondly, in view of this first point, single features of the case of Kosovo -which is arguably compounded of several “anomalies”- can be recalled in the future (actually, they have already been recalled) for either legitimate or illegitimate secessionist movements to push for “Kosovo-like” solutions. In other words -as it has been suggested in other parts of this paper- coupling arguments of remedial secession and uniqueness has contributed only to greater confusion in this field, while it has not made much -on the one hand- to diminish the appeal of secession for discontented minorities, and -on the other hand- to diminish the likelihood that powerful states or coalitions can foster or endorse secession in case of perceived political opportunity.

This brings us to a final class of considerations. This particular attitude to power politics on the global stage is generally known under the name of geopolitics. At the beginning of the 90’s, the world just got over one of the biggest geopolitical clashes -the Cold War- to enter a period which eventually proved to be more insidious and not at all more peaceful. The renewed opposition between Western countries and Russia -in which the issue of Kosovo played all but a marginal role- might be the aftermath of the Cold War, or might be the sign of a new, different geopolitical strain. For sure, the Russian intervention in Georgian internal situation has given a following to the fight

141. Delahunty and Perez (2009), at 39.

142. *Ibid.*, at 85.

143. Coppieters (2008), at 3.

144. Benedek (2008), at 411.

over recognition of new, friendly statelets. The harm has to be envisaged on two distinct planes. The first obliges to recognize that this sort of geopolitical wrestling –which follows the pattern of Cold War’s proxy conflicts-<sup>145</sup> stirs up trouble in those regions where local secessionist sentiments can be fuelled to destabilize the opponent’s interests. Evidently, the negative effects of such “proxy secessions” rest –above all- on the local populations. The second proceeds from the lack of diplomatic capacity of prominent international actors to reach a consensus, especially in the framework of the Security Council, about sensible matters of international security. The ineffective functioning or the sidestepping of this organ evidently threatens the whole United Nations, which is still the most important organ deputed to international peace.

In sum, the independence of Kosovo –as any externally sponsored secession- apparently found its chance of being in reason of the ‘conflicting legitimacy’ of international law and geopolitics.<sup>146</sup> In an interstice of these seemingly relies the chance of a community to constitute itself as a sovereign state. Crawford holds that ‘the creation of States is a matter in principle governed by international law and not left to the discretion of individual States’.<sup>147</sup> In light of the facts, however, this appears to be more of a principle than a normative disposition, while at the same time it is incontestable that ‘[s]ecession has now become today the principal way of gaining independent statehood’.<sup>148</sup> It is therefore to share the opinion of who considers that the most prominent sponsors of “proxy secessions” (namely, USA and Russia) ‘would better serve their national interests if they were to prod the UN membership into negotiating a global multilateral treaty on secession’.<sup>149</sup>

### Is this a conclusion?

This article has examined the historical, legal and political developments that are conducting Kosovo on the way to statehood. An analysis of the legal issues arising from the recent declaration of independence has revealed that there is hardly a right for Kosovo Albanians to their own state. Some credit has been awarded to remedial secession doctrines, which had however to be combined with a step of collective recognition as a way of conveying international dispositive powers. Such explanation is not, however, uniformly interpretable as a sound legal basis to justify what -however seen- remains a unilateral secession. On these premises, it has been contended that external recognition has occurred on political, rather than legal grounds. While the validity of such solution could not be fully assessed, the opportunity of conveying such a measure as a one-sided solution has been deemed rather poor. The international disagreement keeps maintaining Kosovo at the heart of a geopolitical wrestling which, above all, is detrimental to the credibility and the effectiveness of the United Nations. In addition, it has to be acknowledged that recognition and non recognition might respond to political and geopolitical opportunities which are probably not to be considered in the best interest of the local population. To put it differently, recognition based on a label of uniqueness and non recognition based on anachronistic arguments of territorial integrity are to be looked with suspicion, in that both might be blocking the advancement of peoples’ and group rights.

On these premises, it has been decidedly criticized the rationale of supporting such unilateral solution on the basis of a purported uniqueness of the Kosovo case. As it was suggested, while a number of peculiar (and anomalous) events have effectively concurred

145. Slomanson (2009), at 20.

146. Orakhelashvili (2008b).

147. Crawford (2006), Preface to the 2nd Edition.

148. Pavković and Radan (2008), at 1.

149. Slomanson (2009), at 20.

in its history, its precedent effect cannot be excluded a priori. In particular, a concrete risk is envisaged that single features of the Kosovo case are going to be employed in support of further, more or less legitimate attempts of secession. While, at the same time, the uniqueness clause significantly reduces any appeal of supporting the secession of Kosovo as based on remedial arguments. Contrarily to the opinion of Mr. Ahtisaari, who was sententiously arguing that ‘the Kosovo status has been resolved, and today we have a functional independent state of Kosovo’,<sup>150</sup> the question of the status has entered a new legal limbo, while the functionality of Kosovo as an independent state will remain a matter of speculation for a decade at least. Lacking still effective independence and being still –formally and factually– an internationally administered territory such ‘dependent independence’ –as Garton Ash argued– might really be the best option for Kosovo.<sup>151</sup> However, for the moment Kosovo keeps being, at best, a state *in statu nascendi*, whose viability relies entirely on external support, and whose name dramatically recalls the spectres of endless ethno-national fragmentation.

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